85-324

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

ALEX J. FAZZINO,
Defendant-Appellant-Petitioner,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1222 McGee Street
Kansas City, Missouri 64106
(Admitted to U.S. Supreme Court on October 29, 1974)

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(Application for admittance applied for)

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COMES NOW DEFENDANT-APPELLANT, ALEX J. FAZZINO, AND PETITIONS THE COURT TO ISSUE ITS WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND IN SUPPORT THEREOF, PRESENTS THE FOLLOWING:

QUESTIONS PRESENTED

I. WHETHER THE USE, FOR THE PURPOSE OF OBTAINING EVIDENCE AND TESTIMONY, OF AN INFORMANT WHO KNOWS HE FACES POSSIBLE MULTIPLE PROSECUTIONS, BUT WHO HAS RECEIVED NO INDICATION OF THE LIKELY QUID PRO QUO HE WILL RECEIVE FOR HIS COOPERATION CONSTITUTED DE FACTO AN IMPROPER CONTINGENCY AGREEMENT AND DEPRIVED THE "TARGET" OF THE INVESTIGATION DUE PROCESS OF LAW.

II. WHETHER THE USE OF AN INFORMANT ACTING ON A "DE FACTO CONTINGENCY" BARGAIN TAINTS A CONVICTION OBTAINED BY THE TESTIMONY OF ANOTHER, WHEN THE TESTIMONY OF THE KEY WITNESS WAS ONLY AVAILABLE TO THE GOVERNMENT BY REASON OF THE ACTIVITY OF THE "CONTINGENCY INFORMANT".

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OPINION OF THE CIRCUIT COURT

The opinion of the Circuit Court in United States v. Fazzino, No. 84-2179, was filed June 20, 1985, and published at 765 F.2d 125 (8th Cir. 1985).

JURISDICTION OF THE UNITED STATES SUPREME COURT

The Court of Appeals affirmed Petitioner's conviction by an opinion dated June 20, 1985. No petition for rehearing was filed. Certiorari jurisdiction is in the Supreme Court by reason of Title 28, U.S. Code, Section 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment V

18 U.S.C. Section 1951

(Full texts reproduced in appendix)

STATEMENT OF THE CASE

Petitioner was convicted of one count of extortion in violation of 18 U.S.C. § 1951 (The "Hobbs Act") by reason of demanding and receiving money in return for using his position as a Representative in the General Assembly of the State of Missouri to prevent adoption of a bill pending before the Assembly; and acquitted of one count each of extortion and of attempted extortion for taking money and attempting to get money (from another individual) for "killing" bills pending. He was sentenced to serve four years in prison and to pay a fine of $10,000.00.

EVIDENCE AT TRIAL

The bills involved were related to fireworks and the "victims" and principal witnesses, Jerry Wald and James Meyers, were fireworks dealers(T. 265-267, 484-485). The earlier of the two bills, House Bill 1078, considered during the 1982 session (T. 272), would have prohibited sale of Class "C" (consumer) fireworks, which would have seriously cut into Wald's wholesale business (T. 272) and put Meyers' retail fireworks sales operation out of business (T. 206).

The second of the bills, House Bill 449, considered in 1983, would have allowed continued retail sales of Class "C" fireworks, but with more stringent regulations and a high licensing fee (T. 282-283). Wald testified to having paid Fazzino $3,000.00 each (T. 277, 280, 286), some from his own funds and some raised from other dealers, to get the bills killed. Meyers testified to giving Mr. Fazzino $1,800.00 as payment for having killed the first bill (T. 502). The money paid by Meyers was supplied by the government (T. 519). This transaction was the subject of the "attempt" charge.

Both Wald and Meyers were granted immunity from prosecution in return for testifying against Mr. Fazzino. Wald's immunity apparently involved only the money he allegedly solicited for and paid to Mr. Fazzino (T. 287-289, 295-302). Meyers' involved other federal crimes uncovered before the investigation into Fazzino began (T. 495-498). The effect of the manner in which Meyers "earned" immunity is the central point of this petition.

EVIDENCE Re JAMES MEYERS

Meyers had been Missouri State President of the AFL-CIO as well as a fireworks dealer, until losing an election to one "Duke" McVey, amidst charges of misuse of union funds (T. 484-485, 202-203). At trial, Meyers and McVey disagreed as to whether a "Union Trial" substantiated these charges (T. 486-487, 779-787).

An F.B.I "sting" operation obtained evidence that Meyers cooperated in bogus thefts of a town car belonging to the union and a truck belonging to his business. The vehicles apparently went into a "chop shop" operation, and Meyers turned in false insurance claims (T. 495-498). His contact with the theft ring was an F.B.I informant (T. 496). Confronted by the F.B.I., he agreed to cooperate (T. 498).

During discussion of Meyers' participation in the ring and possible cooperation with the F.B.I., Mr. Fazzino's name came up (T. 396). An F.B.I. agent had attempted to record a conversation in a Jefferson City bar during the "sting" operation. Meyers was present. The recording was unintelligible but Mr. Fazzino had been listed as "present and possibly intercepted" (T. 391, 392). The inquiry about Fazzino led to Meyers' asserting that they had discussed the first fireworks bill, and that Mr. Fazzino had said that it would take $3,000.00 to kill it (T. 504). It was soon decided that Meyers' "cooperation" would involve getting evidence against Fazzino (T. 396). There was no specific promise as to whether Meyers would be allowed to plead to a lesser charge, or completely discharged from prosecution at this time (August 1982). Meyers was told his charges would not be discussed again "until it was time to sit down with the United States Attorney" (T. 423). It was not until July 1983 that it was decided to give Meyers a "complete pass" (T. 481-482). By this time Meyers had participated in a series of tape-recorded telephone conversations, with Mr. Fazzino (e.g. Ex. 10, 11 and 13) and two conversations with Mr. Fazzino at Meyers' house, which were videotaped (Ex. 12, 14). At the two videotaped meetings, Meyers handed cash, provided by the government, totaling $1,800.00, to Fazzino.

Meyers had also participated in a series of telephone conversations with Wald, recorded by Meyers or with his consent, wherein Wald was led to discuss having paid money to Fazzino (T. 510). He also agreed to testify in return for immunity after being confronted with this evidence (T. 287-289, 295-302).

ARGUMENT

Petitioner contends that each of the questions presented is a novel issue, and that if the ruling of the Court of Appeals is allowed to stand, the right of persons accused or persons under suspicion to Due Process of Law may be circumvented by the authorities.

I.

Avowedly "contingent" or "bounty" arrangements between the authorities and informants, wherein the pay or other consideration to be given depends on the obtaining of an indictment or conviction of a certain individual or number of individuals, appear to be rare. At least they have seldom been discussed in reported cases since they were condemned in Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), cert. den. 381 U.S. 950 (1965), wherein the court found entrapment in violation of the due process clause of the Fifth Amendment to the Constitution. Where an informer has been paid on a "piecework" basis according to the number of deals in which he participates, or is coerced to "get" a specific defendent by use of his still undetermined State charges, trial courts have held that the informers were thus rendered so incredible that the government failed to carry its burden of proving beyond a reasonable doubt the absence of entrapment. United States v. Jones, 362 F.Supp. 114 (E.D.P. 1973); United States v. Silva, 180 F.Supp. 557, (S.D.N.Y. 1959).

A case involving the "penal interest" of the informant in the Eighth Circuit was United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984). The District Court's denial of post-conviction relief was affirmed because the court en banc was evenly divided (id, 1955). The reasoning of the divisional opinion is sound.

The principal conspirator had already entered a negotiated plea of "guilty", and then agreed to testify against his co-defendants. The U.S. attorneys agreed to stand mute on the informant's motion under Rule 35, Federal Rules of Criminal Procedure, for reduction of sentence if he testified, and to recommend that it be granted if his grand jury testimony led to an indictment. The divisional opinion found a great incentive to lie both before the grand jury and at trial.

Without an express contingency arrangement, the government created an incentive to lie, as well as to manufacture evidence on the part of the informant, a de facto contingency arrangement. Meyers, of dubious basic honesty but possibly himself a victim of entrapment (the representative of the "chop shop" operation who suggested he allow the union's automobile to be stolen was an F.B.I. informant, T. 496). The F.B.I. wanted his "cooperation", and he stood to be convicted on at least two federal fraud counts (T. 495-498). He soon learned the F.B.I. had considerable interest in Mr. Fazzino (T.396), such an interest that they quickly shifted their investigation from "property crimes" to one "targeted" on proving Mr. Fazzino corrupt. Without being expressly given a "contingent" agreement he was told his charges would not be discussed again until the results of the investigation were placed before the United States Attorney. The inescapable implication of this situation is that the better the "job" done on Mr. Fazzino, the better the result he would obtain in his own case. The incentive to lie and to manufacture evidence by manipulating situations would be great. For example, Mr. Fazzino insisted the $800.00 and $1,000.00 payments were part of a "no strings" political contribution (T. 702). The incentive to manipulate the conversation to make a legitimate contribution look like a bribe-extortion transaction would be great.

II.

The Opinion of the Court of Appeals insists that even should the conduct of the government have created a situation wherein Meyers had too much incentive to lie, the fact that the only conviction obtained was for the payments made by Wald, relieved the taint, because the testimony of Meyers was unnecessary to establish proof of that count. It is submitted that this conclusion ignores the facts of the manner in which it was obtained. Wald was confronted with evidence against him obtained by recording telephone conversations between him and Meyers. The same motivation to "get" Mr. Fazzino could have induced the informant to further strengthen the case against Mr. Fazzino by "setting up" Wald in a series of telephone conversations. Unrecorded conversations could have insinuated into Mr. Wald's mind that legitimate political contributions were actually regarded by Mr. Fazzino as direct payments for defeat of the fireworks bills, before Meyers made the recorded calls which gave the F.B.I. the ammunition with which to force Wald to testify. Only Meyers' very limited credibility supports the proposition that this was not done.

CONCLUSION

The testimony of both Meyers and Wald was obtained by reason of the de facto contingency agreement with Meyers. The incentive to lie or misrepresent situations this arrangement gave to Meyers was such that the testimony of both of these key witnesses was tainted, with violation of the due process clause of the Fifth Amendment to the United States Constitution. It is submitted that certiorari should be granted in order to explore (1) the effect of a "de facto" contingency agreement on the validity of an informant's testimony, and (2) the admissibility vis a vis the due process clause of testimony obtained, solely as a result of the activity of the "contingency informant".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was mailed, postage prepaid, this _____ day of August, 1985, to:

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James L. Lyons

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALEX J. FAZZINO,
Defendant-Appellant-Petitioner,

- vs -

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

APPENDIX TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

JUDGEMENT AND SENTENCE

This document will be supplied later.

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 18 U.S.C. SECTION 1951

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both.

(b) As used in this section --

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point

outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

(June 25, 1948, c. 645, 62 Stat. 793.)

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 84-2179

United States of America,
Appellee,

v.

Alex J. Fazzino,
Appellant.

* Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 14, 1985
Filed: June 20, 1985

Before ROSS, Circuit Judge, BRIGHT, Senior Circuit Judge, and NICHOL,* District Judge.

PER CURIAM.

Appellant Alex J. Fazzino seeks a reversal of his conviction for extortion on the ground that his conviction was obtained in violation of the due process clause. Fazzino claims that the government's use of James Meyers as an informant and as a trial witness deprived him of fundamental due process protected by the United States Constitution. We disagree and affirm his conviction.

* The HONORABLE FRED J. NICHOL, Senior Judge, United States District Court for the District of South Dakota, sitting by designation.

Fazzino, a member of the Missouri State Legislature, was charged by indictment on April 19, 1984, with two counts of extortion and one count of attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. The alleged extortions and attempted extortion involved the request for and payment of money to Fazzino in return for his assistance in defeating two pieces of proposed legislation involving the state's regulation of the fireworks industry.

A trial was held in July, 1984. The government's case included, among other things, the testimony of James Meyers who had been cooperating with the government since sometime in 1982, and videotapes and recordings of conversations and meetings between Meyers and Fazzino. Both Wald and Meyers testified that in 1983 they paid money to Fazzino in exchange for his promise to defeat the pending legislation. Both of the bills were assigned to a committee which Fazzino chaired; neither were ever called up for a hearing and consequently both died at the expiration of the legislative session.

At trial Fazzino denied ever receiving any money from Wald prior to 1983 and that amounts he received from Wald in 1983 and from Meyers were campaign contributions. Fazzino reported the money as "contributions" in January 1984 after an interview with FBI agents.

The jury convicted Fazzino of extorting $3,000.00 from Wald during 1983 (count III) and acquitted him of the other charges. Fazzino was sentenced to four years and a $10,000.00 fine. Fazzino appeals.

On appeal, Fazzino claims that an agreement between the government and the government's witness, Meyers, irreparably tainted Meyers' trial testimony, depriving Fazzino of the fair procedures guaranteed by the due process clause of the fifth amendment. It is Fazzino's contention that Meyers, who was under investigation by the FBI for mail fraud, was cooperating with the government pursuant to a "de facto contingency agreement" (Appellant's Brief, p. 14), whereby the outcome of any criminal prosecution against Meyers would depend upon the quality of evidence he obtained against Fazzino. The essence of Fazzino's argument is that he was denied due process because the government's agreement with Meyers improperly affected Meyers' conduct and, more importantly, Meyers' trial testimony thereby hampering the truth-finding function of the jury. Fazzino relies on the panel opinion in United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984) in which the panel reversed the district court, holding that a contingency agreement between the government and the star prosecution witness violated Waterman's due process rights. [1]

We have carefully considered Fazzino's argument and based upon our review of the record, conclude that it is totally without merit. There is no factual basis to support his allegation of a constitutional violation involving the testimony of Meyers. Fazzino failed to establish that there was any contingent agreement between Meyers and the government and, more importantly, failed to demonstrate how Meyers' testimony was critical to his conviction for extorting money from Wald. Fazzino was acquitted of attempting to extort money from Meyers.

In addition, there is no legal basis to support Fazzino's argument that can be premised upon United States v. Waterman, supra. Neither the panel opinion nor the en banc decision in United States v. Waterman, supra, has any precedential value and even if the panel opinion had precedential value its holdings would not apply under the facts of this case. See United States v. Daily, 759 F.2d 192, 196-98 (1st Cir. 1985).

Accordingly, we affirm Fazzino's conviction.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[1] This case was considered by the court en banc and the judgement of the district court denying Waterman's section 2255 motion was affirmed by an equally divided court. 732 F.2d at 1533.